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Re: KTLS(FM), Newcastle, Oklahoma  
Tyler Broadcasting Corporation  
File No. BPH-9701211A  
Special Temporary Authority

KIMY(FM), Watonga, Oklahoma  
Vera Dunn  
MM Docket 95-175

Dear Counsel:

This is in reference to: (i) the November 6, 1997 request for Special Temporary Authority ("STA") filed on behalf of Tyler Broadcasting Corporation, licensee of FM station KTLS(FM), Newcastle, Oklahoma ("Tyler"); (ii) the October 9, 1997 Emergency Request for Order to Require Station KIMY, Watonga, Oklahoma to Change Channels or Deletion of Condition on Construction Permit and/or Special Temporary Authority ("Emergency Request") filed by Tyler; (iii) the November 10, 1997 Opposition to the Emergency Request ("Opposition") filed on behalf of Vera Dunn, licensee of station KIMY(FM), Watonga, Oklahoma ("Dunn"); and (iv) all other related pleadings.

## MM Docket 95-175

Pursuant to the *Report and Order* in MM Docket No. 95-175, 11 FCC Rod 16896 (Policy & Rules Division 1996), the Commission ordered station KIMY to change Channels from 228A to 230A. This channel change was necessary in order to accommodate Tyler's request for change in community of license and reallocation of Channel 227C1 from Ada to Newcastle, Oklahoma for station KTLS. The *Report and Order* became effective on January 17, 1997. Pursuant to Commission policy, Tyler must reimburse Dunn for the reasonable costs associated with its change of frequency of Station KIMY as governed by the *Second Report and Order* in BC Docket No. 16662 (Circleville, Ohio), 8 FCC 2d 159 (1967) ("*Circleville*").

### Emergency Request

Pursuant to the *Report and Order*, on January 21, 1997, Tyler filed an application for construction (File No. BPH-9701211A) permit to implement its change in community of license. On July 8, 1997, the Commission granted the application authorizing Tyler to construct Class C1 facilities for Station KTLS, Newcastle, OK. However, due to a short spacing to Dunn's present facilities of station KIMY on Channel 228A, the construction permit contains the following special operating condition and restriction:

Program Tests for KTLS(FM) will not commence on Channel 227C1 until Program Tests for KIMY(FM) commence on Channel 230A and a License will not be granted for KTLS(FM) on Channel 227C1 until a License is granted for KIMY(FM) on Channel 230A.

The condition specifically limits the operation of Tyler's station on Channel 227C1 to cover Newcastle, Oklahoma until Dunn's station commences operation of Channel 230A. Tyler indicates that KTLS is fully constructed and is ready to go on-air. Tyler acknowledges the fact that the condition has not been satisfied. In recognition, Tyler submits the Emergency Request in which it requests that the Commission to direct Dunn to operate station KIMY(FM) on Channel 230A from its present site.<sup>1</sup>

Tyler seeks relief so that it may begin operation with its newly constructed facilities. Tyler states that it has been unable to reach an agreement with Dunn on the channel change expenses for which Dunn is entitled to reimbursement. Tyler asserts that it has attempted to negotiate in good faith a reimbursement amount with Dunn. Tyler claims that Dunn's latest reimbursement demand of \$146,190 is extremely unreasonable. Therefore, Tyler appeals to the Commission to determine the amount of reasonable expenses for which Tyler is responsible, and to require Dunn to accept a reasonable amount to change channels and for incidental costs. In the alternative, Tyler asks the Commission to permit KTLS to initiate operating from Newcastle without regard to whether KIMY has completed the required channel change.

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<sup>1</sup> The staff confirms that operation on Channel 230A would be acceptable at the KIMY licensed transmitter site.

### Opposition

Dunn argues that Tyler's Emergency Request is unfounded. Dunn asserts that Tyler has never acted in good faith and has repeatedly failed to respond when provided estimates and requests for meetings. Dunn states that it has no intentions of delaying Tyler's move. However, Dunn argues that it simply wants Tyler to treat the station fairly and compensate reasonable expenses in accordance with the rules. Counsel for Dunn states that he is involved in several cases in which comparable stations were paid the same or higher amounts than estimated by Dunn.

Dunn strongly opposes Tyler's suggestion that the Commission should disregard the special operating condition which limits the commencement by Tyler of operations on 227C1 until Dunn commences operation on 230A because it would result in objectionable interference to the current operation of Dunn on 228A. Dunn states that such an approach would affect 1009 persons. Since KIMY's entire market is only 3800-4000 people, Dunn argues that to do so would cause interference to 25-27% of KIMY's market. Dunn states that the Commission has stated that KIMY does not need to change its channel until it receives payment.

### Reply

In reply to Dunn's opposition, Tyler states that Dunn's demand for \$146,190 is unsupported by the evidence and cannot be justified under existing precedent, i.e., *Circleville* and more recent precedent, *Peter Wayne Lechman*, 8 FCC Rod 3058 (1993). Tyler states it is unwilling to pay Dunn a penny beyond actual, provable expenses associated with the channel change. Tyler takes issue with Dunn's statement that the reimbursement is comparable to other stations. Tyler argues that *Circleville*, and not amounts other stations have received, should be used to determine the reimbursement amount. Tyler disagrees with Dunn's conclusion that it does not have to change channel until payment is received. In the *Report and Order* in MM Docket No. 95-175, para 19, the Commission stated that no station need take steps to change frequency until it is assured that it will receive payment. Tyler has assured Dunn that it will make reimbursement. Therefore, Tyler concludes Dunn must change channels now.

### Discussion

The Commission established guidelines for determining the reimbursement owed to a licensee ordered to change frequencies in *Circleville*, *supra*. In such cases, the Commission expects the parties to determine expeditiously, mutually and in good faith reasonably and prudently incurred reimbursable expenditures. The Commission will involve itself in such matters *only* as a last resort. See, e.g., *Harold A. Jahnke*, 74 FCC 2d 265 (1979). The Commission in *Circleville*, in establishing the guidelines governing the reimbursement owed by the benefiting party, considers the following items to be reasonable expenses for a channel change: (1) engineering and legal costs; (2) new equipment that is legitimately required for the channel change; (3) the printing of new logs and stationery; (4) out-of-pocket expenses while the station is off the air; and (5) limited advertising for the new frequency (as long as there is not an attempt to improve the station situation at the expense of the reimbursing party). While this list is not all-inclusive, we see no need at this point for further clarification. We continue to believe that most cases can be resolved through the good faith negotiations of the parties.

### CERTIFICATE OF SERVICE

I, Scott C. Cinnamon, do certify that I have on this 3rd day of October, 2007, caused to be transmitted by e-mail and/or mailed by first class mail, postage prepaid, copies of the foregoing **"REPLY TO RESPONSE TO REQUEST FOR URGENT ACTION OF ARSO AND OPPOSITION TO NOTICE OF INTENT TO RESPOND OF ARZUAGA"** to the following:

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